

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No. : 1661/2012

Case No. : 1662/2012

In the matter between:-

THE STANDARD BANK OF S A LIMITED

Applicant

VS

STEPHANUS PETRUS JOHANNES STRYDOM

1st Respondent

[Born on 31 December 1971,
ID Number: 7112311 5195 087,
Married out of community of property with
JOSEPHINE STRYDOM,
Born on 6 August 1973,
ID Number: 730806 0119 088]

and

THE STRYDOM FAMILY TRUST

2nd Respondent

DELIVERED ON:

18 OCTOBER 2012

JUDGMENT

MOCUMIE, J

- [1] The applicant lodged an application for the sequestration of the first and second respondents (*“the respondents”*) on 24 April 2012 on the basis that the first respondent is indebted to it in the total amount of R10 432 149.68 on various agreements including an Agricultural Production Loan,

Business Current Account, Medium Term Loan Agreement, as well as various Vehicle and Finance Accounts. The second respondent is indebted to it on the same basis as the first respondent in the amount of R9 252, 226, 66. In case 1661/2012 the application is against Mr Stephanus Petrus Johannes Strydom (*“Mr Strydom”*) in his personal capacity and in case 1662/2012 against Mr Strydom, Mrs Josephine Strydom (Mr Strydom’s wife) and a certain Mr Jacobus Casparus Crause in their capacity as trustees of Strydom Family Trust, IT 773/2009 (*“the Family Trust”*). The first and second respondents will hereafter, for convenience, be referred to as the respondents.

- [2] The applicant is Standard Bank of South Africa Limited (*“Standard bank”*), a company duly incorporated in accordance with the company laws of South Africa and registered as a commercial bank which has its principal place of business and registered head office at Standard Bank Centre, 5 Simmons Street, Johannesburg, Gauteng Province.

[3] The first respondent is Mr Strydom, a farmer with residential address at 25 Elizabeth Street, Edenville, Free State Province. He is married out of community of property to Josephine Strydom. Second respondent is the Family Trust. Both applications will be treated as one as the facts and their basis are the same.

[4] In the applicant's founding affidavit the deponent, Mr Loris Cappilati, Head: Business Resources, Personal and Business Banking Credit Division, submits that:

“7.1 An Agricultural Loan Agreement was approved for 652 hectares of dry land maize and 235 hectares dry land soya beans for the 2010/2011 production season on condition that the aforesaid Agricultural Production Loan facilities were payable in full from the first crop proceeds and repayable fully, by 31st August 2011. Notwithstanding promises by the Respondent to repay the aforesaid Agricultural Production Loan by 31st August 2011, it was established by Mr Riaan von Wielligh, the Applicant's branch manager in Kroonstad, that neither the maize crops nor the soya bean crops had been received by the Applicant and no payment had been forthcoming

from the aforesaid proceeds of the maize and/or soya bean crops. During the aforesaid visit by Mr Riaan von Wielligh, the Respondent confirmed that he used the proceeds from his maize and soya beans crops to pay outstanding debts to other creditors, in order to enable him to finish planting his wheat crop. It is humbly submitted that the aforesaid established an act of insolvency in terms of Section 8(c), alternatively Section 8(d) of the Insolvency Act, Act 24 of 1936;

- 7.2 On the 2nd June 2011 a wheat production loan facility was increased to R1, 300,000.00 as the Respondent indicated that he wishes to plant 329 hectares of wheat. The same conditions applied insofar as the wheat crop was concerned, which should have been delivered and paid into the Applicant's account during or about December 2011 when the wheat crops had to be harvested. On the 13th January 2012, Mr Riaan von Wielligh had a meeting with the Respondent in Bethlehem, and at the said meeting the Respondent confirmed that he harvested 396 tons of wheat, which he had delivered to VKB, and notwithstanding promises that he would make sure that payment be effected to the Applicant, no such payment was received by the Applicant. Again these payments were to creditors of the Respondent without payment to the Applicant. It is humbly submitted that this also

established an act of insolvency in terms of Section 8(c), alternatively Section 8(d) of the Insolvency Act, Act 24 of 1936;

7.3 As will more fully appear hereunder, the Respondent also made or offered to make an arrangement to pay his indebtedness to the Applicant which also established an act of insolvency in terms of Section 8(e) of the Insolvency Act, 24 of 1936;

7.4 I am also aware of the fact that the Respondent in the meantime would again harvest in the near future, maize as well as soya beans, and have I in the meantime established that the Respondent opened a bank account at FNB, and is obviously currently channelling his business activities through his FNB account, and not in any account with the applicant."

[5] The second deponent, Mr Riaan von Wielligh, who is the Branch Manager Kroonstad, submits that:

"9.1 The deponent, Mr Von Wielligh (the deponent) visited the Respondent on his farm on the 13th May 2011 at 11:00 in the morning to establish the progress made with the planting of wheat crops as well as to confirm the maize and soya beans progress as confirmed by the Santam Insurance Company. The Respondent was busy with the

harvesting of his soya beans and indicated that he was averaging 1.3 ton per hectares and that he would receive the proceeds on the first 300 ton within a week or two. None of the proceeds was ever received on the soya beans by the Applicant.

9.2 The deponent had a telephonic conversation with the Respondent on the 27th May 2011 when the respondent indicated that he was 60% finished with the harvesting of the soya beans and would start with the maize once he was finished with the soya beans. At that stage silo certificates were already delivered to EAC but no payments had been made towards Standard Bank in reduction of the production loan. The Respondent indicated that he was struggling with his PIN at EAC to release the funds.

9.3 On the 2nd June 2011 the wheat production loan facility was increased to R1, 300,000.00 as the Respondent indicated that he planted 329 hectares. This was confirmed by Santam Insurance and the Respondent also took out hedging contracts as required by the agreement with the bank.

9.4 The deponent was struggling at that stage to get hold of the Respondent telephonically and again visited the Respondent on his farm on the 7th June 2011 at 12:00. The Respondent was busy harvesting his maize and

indicated that he had flood damage on his crops and that he has put in a claim with the insurance company.

- 9.5 Again after the deponent, referred to in annexure 'B' hereto, struggled to get hold of the Respondent, visited the Respondent's farm on the 24th August 2011 to establish why no payment on the maize or soya beans has been received by Standard Bank. On this date the Respondent confirmed that he used the proceeds from his maize as well as soya beans to pay outstanding debts and also to enable him to furnish planting his wheat crop. He claimed to have planted 270 hectares and promised to pay the proceeds of the wheat crop to Standard Bank. He indicated that he settled all his creditors which at that stage amounted to approximately R1, 000,000.00.
- 9.6 On the 19th September 2011 the Respondent visited the deponent referred to in annexure 'B' hereto, and provided him with two cash flow proposing repayments of his facilities at Standard Bank.
- 9.7 On 27 September 2011 the Respondent again visited the deponent providing again cash flow statements of proposed repayments, which again did not materialize.
- 9.8 On 28 November 2011 a letter of demand was hand-delivered to Respondent regarding his indebtedness as well as the *Strydom Family Trust*, which I attach hereto as annexure 'C'.

- 9.9 The Respondent again visited the deponent referred to in annexure 'B' hereto on the 7th December 2011 and provided him with his own cash flow suggestions as to repayment. The Respondent suggested that a repayment schedule would take place by way of the proceeds of the farms that he indicated he was going to sell, i.e. the farms 'Syferlaagte' and 'Blydskap'.
- 9.10 Furthermore, a letter of acknowledgement of debt with Standard Bank was also provided to the Respondent on 27 December 2011, which he declined to sign. I attach the draft letter of acknowledgement of debt, which emanated from the discussions with the Respondent, hereto as annexure 'C2'. It must be noted that a typing error as to the dates on which there was an arrangement for the necessary guarantees to be provided was made insofar as reference is made to January 2011. It should have been January 2012, as the Honourable Court will see from the date of the letter, being 27 December 2011.
- 9.11 After the Respondent declined to sign annexure 'C2' hereto, an investigation was started as to where the maize, soya beans and wheat were delivered because the Respondent indicated that he would deliver all his crops to Senwes and he mentioned that he delivered the wheat to VKB, but we registered our cession on his commitment with Senwes.

- 9.12 On 13 January 2012 the deponent, referred to in annexure 'B' hereto, had a meeting with the Respondent in Bethlehem. At this meeting the Respondent confirmed that he harvested 396 tons of wheat which he had delivered to VKB and of which the last load would have been delivered the same day. He undertook to request for the issue of the silo certificates to Standard Bank and make payments towards the reduction of the production loan at Standard Bank. None of the payments have been received by Standard Bank.
- 9.13 On 10 February 2012 the Applicant received a letter from Respondent's attorney E A L MULLER from POTCHEFSTROOM indicating amongst others that according to the Respondent the '*settlement agreement*' with reference to the draft letter hereto, annexure 'C2', was totally different, and that Respondent would like to arrange for a meeting. I attach the last-mentioned letter hereto as annexure 'C3'.
- 9.14 I was further able to confirm that the Respondent delivered 1206 tons of maize in 2011 and further that many tons of maize was delivered to a feedlot in his proximity, in a figure of approximately 300 tons. This was never mentioned to the Applicant.
- 9.15 It was also established that the Respondent delivered a total of 283,47 tons of wheat in the silos of VKB, and that

there is approximately 200 tons of wheat currently lying with EAC.

9.16 It could not be established where the Respondent delivered the balance of 113 tons of wheat.

9.17 I also established that no progress has been made towards the sale of the farms that the Respondent indicated he would sell in order to make payments to the Applicant.

9.18 It was also established that the Respondent opened an account with FNB during 2011.

9.19 I have since not been able to make any contact with the Respondent whatsoever, and Respondent is not responding to any messages, e-mails or phone calls sent from the branch of the Applicant in KROONSTAD.

ACTS OF INSOLVENCY:

10.1 As referred to above, and notwithstanding cessions of all proceeds of crops, which the Applicant has, or the cession of the proceeds of insurance on crops, as referred to above, the Respondent delivered his maize and soya bean crops between July and August 2011 to other creditors and thereby preferring some of his creditors above others, being the Applicant.

10.2 Furthermore, and again notwithstanding the aforesaid cessions referred to above, Respondent delivered his wheat crop during December 2011 to other creditors and

thereby preferring some of his creditors above others, being the Applicant.

10.3 It is therefore humbly submitted that in both of these instances, the Respondent committed acts of insolvency in terms of Section 8(c), alternatively Section 8(d) of the Insolvency Act, Act 24 of 1936.

10.4 I furthermore humbly submit that from annexures 'C1', 'C2' and 'C3' referred to above, the Respondent also committed an act of insolvency in terms of Section 8(e) of Act 24 of 1936."

[6] The applicant's case is the following. On the respondents' own admissions, through Mr Strydom, the respondents sold some of the crops that were ceded in favour of the applicant to pay off its other creditors. This showed that the respondents preferred some creditors such as VKB and EAC above the others which cannot be to the advantage of the rest of the *creditorium concursus*, including the applicant; the respondents' financial statements for end of 28 February 2010 showed that respondents' liabilities far exceeded their assets. Respondents, through Mr Strydom, negotiated to pay the amount due in instalments which they later reneged on. On that basis respondents were factually insolvent.

[7] The respondents oppose the application on the following grounds, as set out in their opposing affidavit:

7.1 They were unable to agree to the amounts allegedly owed in terms of the contracts as the balance certificates appended to the papers did not show how these amounts were calculated;

7.2 The credit granted to the respondents in terms of the respective agreements amounted to reckless credit granting contrary to the National Credit Act, 4 of 2005 (*“the NCA”*) since:

- the applicant failed to comply with the peremptory provision of *inter alia* section 81(2) of the NCA to conduct an assessment prior to entering into the credit agreements, alternatively to have entered into the said agreements although on a preponderance of available information, entering into the said credit agreements would render respondents over indebted as contemplated in section 79 of the NCA.
- that the applicant did not have the necessary *locus standi* to apply for respondent’s provisional

sequestration on the basis that the credit agreements entered into were liable to be set aside.

- In the alternative, the respondents submitted that they did not owe the applicant any amount of money because on 2 October 2011 the applicant and respondents, represented by Mr Strydom, entered into a verbal agreement in terms of which the applicant afforded the respondents an opportunity to settle the entire indebtedness to it by paying one third thereof on or before 2 October 2012, the second third on or before 2 October 2013 and the final third on or before 2 October 2014.

[8] The respondents deny having committed any acts of insolvency and aver that their conduct was at all relevant times aimed at compliance with the terms of the oral compromise between Mr Strydom, representing himself and the Family Trust, and the applicant. The respondents deny that they are factually insolvent.

[9] In its replying affidavit the applicant relied on the terms of the underlying written contracts which set out the following:

9.1 that any amendments to the contracts must be in writing and signed by both Standard bank and respondents; and

9.2 that a balance certificate signed by one of Standard bank's managers will be sufficient proof of any amount due and payable in terms of the credit agreements

Over and above, the applicant submitted that the said credit agreements could not be regarded as granting of reckless credit as the agreements fell to be excluded in terms of the NCA as the Act did not apply to any transaction in terms of which the consumer is a juristic person whose asset value or annual turnover at the time of the transaction equaled or exceeded the threshold value determined by the Minister in terms of section 6 of the NCA.

[10] Section 10 of the Insolvency Act, 24 of 1936 ("the Insolvency Act"), provides:

“If the court to which the petition for the sequestration of the estate of a debtor has been presented is of the opinion that *prima facie*-

- (a) the petitioning creditor has established against the debtor a claim such as is mentioned in subsection (1) of section *nine*; and
 - (b) the debtor has committed an act of insolvency or is insolvent; and
 - (c) there is reason to believe that it will be to the advantage of creditors of the debtor if his estate is sequestrated,
- it may make an order sequestrating the estate of the debtor provisionally.”

[11] Section 12 of the same Act provides:

- “(1) If at the hearing pursuant to the aforesaid rule *nisi* the court is satisfied that-
- (a) the petitioning creditor has established against the debtor a claim such as is mentioned in subsection (1) of section *nine*; and
 - (b) the debtor has committed an act of insolvency or is insolvent; and
 - (c) there is reason to believe that it will be to the advantage of creditors of the debtor if his estate is sequestrated,
- it may sequester the estate of the debtor.

(2) If at such hearing the court is not so satisfied, it shall dismiss the petition for the sequestration of the estate of the debtor and set aside the order of provisional sequestration or require further proof of the matters set forth in the petition and postpone the hearing for any reasonable period but not *sine die*."

[12] On 16 Augustus 2012 the application for provisional sequestration, which is the first leg of an application of this nature was heard by Jordaan J. Full oral arguments were presented and Jordaan J granted a provisional order of sequestration returnable on 3 September 2012.

[13] I have had sight of Jordaan J's *ex tempore* judgment which both counsel were agreed formed the basis of their argument during the first leg and on the return date when I heard the matter on 13 September 2012.

[14] In his judgment Jordaan J decisively ruled that:

14.1 The respondents presented no factual background which showed that the applicant had committed any act that amounted to reckless credit being granted. In the result the defence could not be sustained.

14.2 The respondents did not lay any factual basis why they were of the view that the applicant did not do an assessment before granting and or extending credit facilities to them. To the contrary the applicant had been in business with the respondents over a long period to know their exact financial position thus their ability to repay the debts.

14.3 The issue of the respondents' indebtedness. The respondents' bare denial of their indebtedness without reference to what, according to them, is the correct amount owing or due was not substantiated and supported by any factual basis and so, could not stand.

14.4 The defence of a verbal compromise. The bringing of an application for sequestration was not a way of claiming payment and that a *pactum de non petendo* has no direct impact on the application.

[15] Mr Zietsman, on behalf of the applicant, submitted that although the degree of proof on the final stage is higher, it

was incumbent on the respondents, on the return date, to present evidence which could disturb the findings of this Court in favour of the applicant. (See **Kalis v Decotex** 1988(1) SA 943(A) at 978G.)

[16] Ms Kok, on behalf of the respondents, submitted that indeed the respondents could not place any other evidence except that which was presented at the provisional sequestration hearing. She however maintained that the applicant still had to prove all the requirements as set out in s12 and that the test was more stringent: The applicant had to show that there was reason to believe that the sequestration of respondents will be to the advantage of the creditors of the respondents.

[17] I am in agreement with the findings of the court during the initial stage of this application as set out in para [14] above. In the absence of any evidence disturbing such findings, I am satisfied that the respondents have not rebutted the unassailable evidence presented by the applicants that respondents are factually insolvent; that there is reason to believe that to place the estates of the respondents in the hands of the Master of this High court and appointing a

curator will be to the advantage of all creditors not only certain selected ones. A curator will be able to place the assets under its control; identify the assets of first respondent on one hand and those of second respondent on the other and extricate the assets of each entity from the other and thereafter give a full account on the assets and liabilities of the separate entities.

[18] In circumstances as the present ones, the application is not what is generally referred to as a “*friendly sequestration*”. Thus the applicant stands at arms length from the respondents and lacks detailed knowledge of their affairs due to the interwoven character of respondents’ estates to comply with s10(c) of the Insolvency Act.¹ The appointment of a curator is the only way the applicant bank will be placed in a position to prove *inter alia* that the sequestration will be to the advantage of all creditors including itself as well as the respondents’ actual insolvency.

[19] I am satisfied that the applicant has made out a clear case for a final sequestration of the respondents’ estate on the

¹ MARS, *The Law of Insolvency*, 9th ed, 140.

basis of s8 (c) (d) and (e) as borne out by the common cause facts as set out in the above paragraphs which respondents could not refute. The applicant is entitled to the relief it sought as set out in the Notice of Motion.

[20] In the circumstances the following order is granted.

ORDER:

- 1. The estates of the first and second respondent in case No 1661/12 and case No 1662/12 respectively are placed under final sequestration.**
- 2. Costs to be costs in the sequestration.**

B.C. MOCUMIE, J

On behalf of applicant:

Adv P Zietsman SC
Instructed by:
Matsepes Inc
BLOEMFONTEIN

On behalf of respondents:

Adv Kok
Instructed by:
Graham Attorneys
BLOEMFONTEIN